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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CORTEZ TRAWETS SCOTT,

Petitioner

-v-

FRANK ELO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Cortez Scott was convicted at a jury trial of first degree murder and possession of a firearm during a felony. Habeas Corpus was denied, and the Sixth Circuit affirmed in a published decision. The questions presented are:

QUESTION 1: WHETHER THE STATE DENIED PETITIONER DUE PROCESS OF LAW BY FAILING TO PROVIDE A TRANSCRIPT OF CRITICAL PORTIONS OF THE TRIAL.

QUESTION 2: WHETHER THE STATE COURT PROCEDURE TO "SETTLE THE RECORD" FOR APPEAL AMOUNTS TO A FRAUD AND DENIAL OF DUE PROCESS.

QUESTION 3: WHETHER IT DENIES DUE PROCESS TO PRESUME FROM THE LACK OF TRANSCRIPT THAT IT CONTAINED NO OBJECTIONS TO THE PROSECUTOR'S ARGUMENT, AND THAT IT CONTAINED NO LEGAL ERRORS.

QUESTION 4: WHETHER THE PROSECUTOR IN HIS ARGUMENTS SHIFTED THE BURDEN OF PROOF.

QUESTION 5: WHERE THE STATE COURTS ROUTINELY GRANT RELIEF FOR THIS ERROR WITHOUT REQUIRING OBJECTION, WHETHER IT

WAS A VIOLATION OF *JOHNSON V. MISSISSIPPI*, 486 U.S. 578 (1988) FOR THE FEDERAL COURT TO DENY REVIEW WHERE THIS TIME THE STATE COURTS RELIED ON LACK OF OBJECTION.

QUESTION 6: WHETHER THE EVIDENCE WAS INSUFFICIENT TO CONVICT.

QUESTION 7: WHETHER PETITIONER WAS DENIED DUE PROCESS BY THE FAILURE OF THE JUDGE TO INSTRUCT ON THE LESSER OFFENSE OF INVOLUNTARY MANSLAUGHTER.

QUESTION 8: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL THAT REQUESTED NO INSTRUCTIONS TO THE JURY ON ANY OF THE PETITIONER'S DEFENSES.

QUESTION 9: WHETHER PETITIONER WAS PREJUDICED BY THE CUMULATIVE EFFECT OF THE ERRORS.

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PETITION FOR A WRIT OF CERTIORARI

CORTEZ T. SCOTT, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review the ruling of the Sixth Circuit Court of Appeals of September 6, 2002, affirming the denial of a Petition for Habeas Corpus.

OPINIONS BELOW

The Appendix includes the published opinion of the Sixth Circuit Court of Appeals of September 6, 2002 and the opinion of the United States District Court of March 8, 2001.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Genesee County, Michigan, Circuit Court. The original judgment was entered December 20, 1994. The first opinion of the Michigan Court of Appeals was issued January 21, 1997. The Michigan Supreme Court remanded for more hearings on February 3, 1998. The Michigan Court of Appeals affirmed again on August 18, 1998. The final judgment of the Michigan Supreme Court was issued April 27, 1999. The Judgment of the United States District Court was March 8, 2001. The ruling of the Sixth Circuit Court of Appeals was issued September 6, 2002. This Court has jurisdiction under 28 U.S.C. §1254 to review the final judgment of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Cortez Scott, then 17, was convicted of first degree murder and possession of a firearm during a felony in a jury trial in Genesee County Circuit Court. On December 20, 1994, Judge Earl Borradaile sentenced Petitioner to prison for life plus 2 years.

An appeal was taken to the Michigan Court of Appeals, which affirmed January 21, 1997. On February 3, 1998, the Michigan Supreme Court remanded the case to the trial court for a hearing about a missing portion of transcript. 456 Mich 931 (1998). After remand, the Court of Appeals on August 18, 1998 again found no error requiring reversal . The Michigan Supreme Court denied leave to appeal on April 27, 1999.

A Petition for Habeas Corpus was filed within 1 year of that date. This was denied by opinion and order of the Hon. Victoria A. Roberts of the United States District Court, Eastern District of Michigan of March 8, 2001. The Sixth Circuit Court of Appeals affirmed in a published opinion of September 6, 2002.

Statement of Facts

James (Terry) Crain testified that he was in the

passenger seat of a car driven by Tyrone Williams, with Petitioner Scott in the back seat. As they were pulling off from a stop sign, Crain heard a shot. He saw Williams slump. Crain jumped out of the car and ran as Petitioner grabbed the steering wheel from the back seat. (T 107-110). All had been drinking beer and smoking marijuana. (T 99, 126-130).

Crain also testified that there was another occasion when Petitioner and Tyrone Williams had an argument over some stereo speakers. (T 136-137).

Off. Richard Vickrey testified that he got a call on February 16, 1994 at 11:09 p.m., that he went to Holmes Junior High School on Oxley Drive, and that he saw a body on the ground in a parking lot with a bullet hole to the right forehead of the deceased. He found some money and a cassette tape on the ground nearby. (T 12-17).

Tyrone Williams was the next door neighbor of Petitioner. (T 154). After the shooting, Thaddous Carl Williams, father of Tyrone, had Petitioner in his car, a Cadillac. (T 120). According to Mr. Crain, an angry group of men confronted Petitioner, and pulled him out of the car. (T 146). Crain personally slapped Petitioner. (T 122). When police arrived, they found 5 or 6 men yelling at Petitioner. (T 24).

Dr. Douglas Condon testified that Tyrone Williams died from being shot. (T 71).

Sgt. Thomas Korabik testified that after Petitioner Scott

was taken away from the mob, he was questioned and complained about Williams always taking his things. Then, on the night in question, Petitioner had paid Williams $35 that Williams was to use to buy marijuana for Petitioner. Williams kept the money. (T 182-183). Sgt. Korabik testified that Petitioner said he pulled out a gun, said "What's up now," and shot Williams. Terry (James Crain) jumped from the car and ran. Petitioner drove to Holmes School and removed the deceased from the car. (T 184-185). Petitioner said that the gun went off when Williams grabbed his hand. (T 191).

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER THE STATE DENIED PETITIONER DUE PROCESS OF LAW BY FAILING TO PROVIDE A TRANSCRIPT OF CRITICAL PORTIONS OF THE TRIAL.

QUESTION 2: WHETHER THE STATE COURT PROCEDURE TO "SETTLE THE RECORD" FOR APPEAL AMOUNTS TO A FRAUD AND DENIAL OF DUE PROCESS.

This case should be accepted and a ruling issued on the merits to determine precisely the legal effect where portions of the transcript cannot be transcribed due to no fault of the Petitioner. What was missing was the majority of the prosecutor's closing argument. There is no doubt that the unavailability of transcripts for appeal is something that happens again and again in this country's judicial systems. Because the Sixth Circuit ruling here was for publication, considerable mischief will be done if this ruling was wrong. Where the last major United States Supreme Court ruling on the subject dates back to 1978, the time has come for the Supreme Court to consider the issue.

The ruling below was essentially: (1) it does not deny due process to provide a defendant with an incomplete transcript for appeal; (2) it is presumed that no errors or prejudicial argument by the prosecutor occurred during the

missing portions of the transcript; (3) as to error found in the portion that was transcribed, there was no objection made in those portions of the transcript that were missing; (4) the state court procedure to "settle the record" did not deny due process; and (5) the federal court must defer to the findings of the state court about what the missing transcript portions would say, if they had been transcribed.

The federal court is to defer only to those state court factual findings that are reasonable. *Williams v. Taylor*, 529 U.S. 362; 120 S.Ct. 1495; 146 L.Ed.2d 389 (2000); 28 U.S.C. §2254(d)(2).

The State of Michigan has undertaken to provide criminal defendants with true transcriptions of their trials by qualified court reporters. M.C.R. 8.108. A defendant has the right to rely on the State's promise.

Yet, the so-called transcript contains the notation that "Portion of Mr. DeWitt's closing argument was not recorded – due to error." (T 203). What we got was 2 1/2 pages of prosecutor DeWitt's closing argument, clearly a small excerpt of the total. This "error" seriously infringed on Petitioner Scott's right to a fair trial and right to a fair appeal. Petitioner did, in state and federal court, complain of improper prosecutor conduct in the portion of the closing argument that was transcribed. Any more serious errors that occurred during the prosecutor's closing argument were heard by the jury and had an impact on them, but are forever concealed

from appellate counsel and the reviewing courts.

Not only does the state's failure directly interfere with raising any claims based on the portion of the transcript not prepared, but also interferes with the claims that were made. In state court, the Court of Appeals rejected an issue of prosecutor misconduct based on failure to object. However, defense counsel may have objected many times to the same errors during the portion of the argument that was not transcribed. But, without a transcript, Petitioner has no way to prove that. In other words, the absence of a transcript is taken by the Michigan Court of Appeals and therefore by the federal court as being proof that nothing objectionable happened during the closing argument, and as being proof that no objections were raised.

For a court to infer the contents of an untranscribed record is absurd and unreasonable. The factual finding that no objection was made is not only not supported by substantial evidence; it is not supported by any evidence at all. The "finding" is equivalent to an umpire showing up at the 9th inning of a baseball game, and finding that no runs had been scored, because the umpire did not see any runs.

The action of the Michigan Court of Appeals in rejecting the issue for lack of objection was clearly unreasonable, in that it presumes that where the state has failed in its obligation to provide a full transcript, the portion they failed to provide would support the state's position.

If there is to be no remedy for a defendant who is cheated out of his full transcript, prosecutors would certainly want this practice of incomplete transcripts to continue, because it so directly and severely prejudices the right of any defendant to win reversal on appeal. When no meaningful remedy is provided for missing transcripts, no state actor has any incentive to correct the problem. If portions of transcripts are missing, the only person who suffers is the defendant. Clearly, the state would prefer to not suffer for its own wrongdoings. Here, the state gets the benefit of not only not suffering, but the bonus of having its opponent automatically lose an appeal because of state misconduct. By rewarding the state's failure, the state courts denied due process of law.

At the post-trial hearing on the missing transcripts, defense counsel did not remember exactly what was said during the prosecutor's closing arguments. That left the defendant to the mercy of the prosecutor's memory. Not surprisingly, the prosecutor remembered nothing that might help the defendant on appeal.

What defendant could ever win any appeal, when the record is nothing more than whatever the prosecutor chooses to admit? If arguable error takes place, but the prosecutor fails to remember it, then the appeal is over. The prosecutor gets to decide whether the defendant has the right to appeal or not.

A full and complete transcript of the trial proceedings is ordinarily considered essential to effective appellate advocacy. As the Court noted in *Hardy v. United States*, 375 U.S. 277, 288; 84 S.Ct. 424; 11 L.Ed.2d 331 (1964):

> "But when, as here, new counsel represents the defendant on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? ... The right to notice 'plain error or defects' is illusory if no transcript is available."

See also Justice Goldberg concurring in *Hardy v. United States*:

> "As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of error, a lead to error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy."

The Constitution, specifically the due process clause, requires a reliable record for appeal. *Mayer v. Chicago*, 414 U.S. 189; 92 S.Ct. 410; 39 L.Ed.2d 378 (1978); U.S. Const., Amend. XIV. The Court in *Mayer* spoke of the need for a

"record of sufficient completeness to permit proper consideration of his claims." The unavailability of a complete and accurate record of proceedings requires the granting of a new trial because of the requirements of due process and the protection of the state constitutional right to appeal, Const. 1963, Art 1, §20. *People v. Frechette*, 380 Mich. 64 (1968); *People v. Tillman*, 406 Mich. 898 (1979); *People v. Austin*, 76 Mich. App. 455 (1977). Once transcription errors or omissions are shown, the burden is on the State to show that the existing incomplete transcript will not prejudice the Defendant on appeal. *Mayer v. Chicago*, supra, 30 L.Ed.2d at 379, 381.

The state courts failed to place this burden on the prosecutor. Instead of requiring proof of what took place before the jury, they allowed a one-sided presentation by a partisan, the prosecutor, to be the record. Such a truncated "record" is not likely to be a fruitful source of appealable errors. Rather, its very purpose is a fraud, to make it seem as if there really is a record of what happened during the prosecutor's closing argument, when there is not. It is the hope of the state that by calling this a "record," reviewing courts will be deceived into thinking it really is a record.

Prosecutors are often cited on appeal for introducing irrelevant and prejudicial matters, for making argument not based on the evidence, for commenting on the accused's exercise of the right to remain silent, for shifting the burden of

proof, and for otherwise making improper argument. But a prosecutor, in recalling his own closing argument, is not likely to recall that he argued improperly. A prosecutor is unlikely to consider his own acts to be misconduct. Even if he did, the prospect of remembering what was arguably misconduct, two years later, is very slight.

The finding that there is no evidence of prosecutorial misconduct is similarly nonsensical, since it assumes an impossibility: that we can know with any confidence what happened during portions of the trial that were not transcribed. By the lower court's logic, a state could provide a defendant with no transcript of the trial at all, and the appeal would have to lose because of no evidence of any error at the trial, since there would be no transcripts containing any error.

Other criminal defendants in Michigan courts are routinely provided with full and complete transcripts of their trial for use on appeal. Petitioner is entitled to the same kind of appeal that those defendants are given, a meaningful appeal where the record can be scrutinized for error and objections. Without the full transcript, counsel cannot scrutinize the record for error, only the memories of the participants. No person familiar with the appellate process would want that kind of appeal for himself or herself.

It is inherently a denial of due process to allow the state to profit, and the Petitioner to be irreparably harmed, by the

action of a state employee, in this case, the court reporter who failed to record. The absence of the transcript is necessarily prejudicial.

If Scott can get no remedy, is there any reason to think this will not happen again? If Scott can get no remedy, his trial cannot be reviewed for errors, because the record needed to document errors has been taken from him.

It is a clear error of law to hold that a hearing taking place 2 years after the trial can provide a record of the trial. It is an error of fact as well. *Lansing Charter Township v Bondy*, 408 Mich 854 (1980) [holding that it would be unreasonable to settle a record at a hearing held 1 1/2 years after the events, because of failure of memory]. To hold that it is a record is a fraud. It is true that a federal court must defer to reasonable rulings of a state court, however, the federal court need not and should not defer to a manifest fraud that calls the prosecutor's memory a record when it is not. It amounts to a ruling that the state is excused from preparing an actual record. It amounts to a presumption that no defendant needs an actual transcript, because the missing pages could not possibly contain any errors. It delegates the Petitioner's right to a meaningful appeal to the one person most likely to not want a meaningful appeal: the prosecutor.

The problems that a defendant faces in trying to overturn a conviction are immense, even when he has the record. When this lopsided game is rigged so that the

defendant cannot even get a transcript, justice hits a new low.

This Court should therefore grant Certiorari and ultimately order a new trial, and this time, the state should arrange to have an actual transcript prepared.

QUESTION 3: WHETHER IT DENIES DUE PROCESS TO PRESUME FROM THE LACK OF TRANSCRIPT THAT IT CONTAINED NO OBJECTIONS TO THE PROSECUTOR'S ARGUMENT, AND THAT IT CONTAINS NO LEGAL ERRORS.

QUESTION 4: WHETHER THE PROSECUTOR IN HIS ARGUMENTS SHIFTED THE BURDEN OF PROOF.

QUESTION 5: WHERE THE STATE COURTS ROUTINELY GRANT RELIEF FOR THIS ERROR WITHOUT REQUIRING OBJECTION, WHETHER IT WAS A VIOLATION OF *JOHNSON V. MISSISSIPPI*, 486 U.S. 578 (1988) FOR THE FEDERAL COURT TO DENY REVIEW WHERE THIS TIME THE STATE COURTS RELIED ON LACK OF OBJECTION.

The essential error in the Court of Appeals' ruling is that it accepts, without any evidence, the state court's unreasonable finding that there was no objection. (Apx A8-A10). The overwhelming majority of the prosecutor's closing argument was not transcribed, not due to any fault of the Petitioner. For a court to infer the contents of an untranscribed record is absurd and unreasonable.

Due process requires that the burden of proof in a criminal case is on the prosecution. *Mullaney v. Wilbur*, 421 U.S. 684; 95 S.Ct. 1881; 44 L.Ed.2d 508 (1975); *Francis v. Franklin*, 471 U.S. 307; 105 S.Ct. 1965; 85 L.Ed.2d 344 (1985). It denies due process for the prosecutor to make argument that has the tendency to shift the burden of proof. *People v. Heath*, 80 Mich. App. 185 (1977); *People v. Shannon*, 88 Mich. App. 138 (1979); *People v. Holbrook*, 154 Mich. App. 508, 512-513 (1986); *People v. Rosales*, 160 Mich. App. 304 (1987); *People v. Lange*, 90 Mich. 454 (1892); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319 (1977); *People v. Reed*, 393 Mich. 342 (1974); *United States v. Smith*, 500 F.2d 293 (6th Cir. 1974).

The prosecutor baldly asserts that Petitioner "considered it and he talked about it [shooting the deceased]." (T 204). The evidence, however, shows no such statement by Petitioner that he intended to shoot the deceased.

The prosecutor argued that "there's no evidence of heat of the moment, heat of passion, of some sudden unexplainable impulse." (T 212). This clearly shifted the burden of proof. The question is not whether the defendant can prove that it was a sudden impulse. The question is whether the prosecutor can prove it was premeditated and deliberated. By focusing on what Petitioner failed to prove, the prosecutor shifted the burden of proof.

A conviction should be reversed where prejudicial and

improper argument by the prosecutor has the effect of denying the defendant a fair trial. *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987); *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983). The standard is whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). As the Court observed in *Speiser v. Randall*, 357 U.S. 513, 525-526; 78 S.Ct. 1332; 2 L.Ed.2d 1460 (1958):

> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."

If the argument is sufficiently improper, it may be cause for reversal even without an objection. *United States v. Harris*, 523 F.2d 172 (6th Cir. 1973); *Malley v. Manson*, 547 F.2d 25 (2nd Cir. 1976); *People v. Rosales*, 160 Mich. App. 304 (1987). In this case we do not know if there was an objection or not. The absence of a transcript of most of the prosecutor's argument means that we cannot know that.

The action of the Michigan Court of Appeals in rejecting the issue for lack of objection was clearly unreasonable, in that it presumes that where the state has failed in its obligation to provide a full transcript, the portion they failed to provide would support the state's position.

Further, even if the ruling of no objection were correct,

it still would not bar federal court review. The failure to object constitutes a bar only if the state has a regularly followed rule that failure to object at the time of sentencing acts as a waiver. See *Johnson v. Mississippi*, 486 U.S. 578, 587; 108 S.Ct. 1981; 100 L.Ed.2d 575 (1988); *Ford v. Georgia*, 498 U.S. 411; 111 S.Ct. 850; 112 L.Ed.2d 935 (1991).

Under Michigan law, no objection is needed for review of a claim that the burden of proof has been shifted. *People v. Richardson*, 409 Mich. 126 (1980); *People v. Wright*, 408 Mich. 1 (1980).

Further, numerous cases have granted relief to defendants based on improper prosecutor argument, where the defendant failed to object. Therefore, Petitioner is not foreclosed from review even though his attorney failed to object. M.R.E. 103(d); *People v. Knolton*, 86 Mich. App. 424 (1978); *People v. Ellison*, 133 Mich. App. 814 (1984); *People v. Sterling*, 154 Mich. App. 223 (1986); *People v. Rone (on 2nd remand)*, 109 Mich. App. 702, 715 (1981); *People v. Rosales*, 160 Mich. App. 304 (1987); *People v. Auer*, 393 Mich. 667 (1975); *People v. Humphreys*, 24 Mich. App. 411, 416 (1970); *People v. Tarpley*, 41 Mich. App. 227 (1972); *People v. Coffman*, 45 Mich. App. 180 (1973); *People v. Strong*, 404 Mich. 357, 363 (1978).

The Sixth Circuit clearly erred by refusing to consider the question of whether the state court rule has been

consistently and regularly applied, where the United States Supreme Court directs that is the standard.

In *United States v. Smith*, supra, 500 F.2d at 294, the Court said:

> "[W]e hold that the prosecutor's comments were improper because they had the effect of shifting the burden of proof from the government to the defendants and abrogating the presumption of innocence to which appellants were entitled."

The prosecutor's remarks tainted the jury deliberations with unconstitutional considerations. This Court should therefore grant Certiorari and ultimately a new trial.

QUESTION 6: WHETHER THE EVIDENCE WAS INSUFFICIENT TO CONVICT.

Sufficiency of evidence is measured by the standards of *Jackson v. Virginia*, 443 U.S. 307; 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979). Under *Jackson*, we view the evidence in the light most favorable to the prosecution, and determine whether the evidence so viewed can reasonably be said to constitute proof beyond a reasonable doubt.

Under Michigan law, to convict of first degree murder, the prosecutor must show beyond a reasonable doubt that the defendant intended to kill, and that after forming that intent,

he premeditated and deliberated on the intent, before committing the acts that caused death. *People v. Woods*, 416 Mich. 581 (1982); *People v. Garcia*, 398 Mich. 250 (1976). Intent to kill must first be formed, and then reconsidered, before it can be said that premeditation and deliberation existed. *People v. Martin*, 392 Mich. 553, 560 (1974).

Under Michigan law, "An unlawful homicide is presumed to be murder in the second degree. The burden is then the State's to prove facts which elevate the offense to murder in the first degree." *People v. Lynch*, 47 Mich. App. 8, 18 (1973).

James Crain testified that he was in the passenger seat of a car driven by Tyrone Williams, with Petitioner Scott in the back seat. As they were pulling off from a stop sign, Crain heard a shot. He saw Williams slump. Crain jumped out of the car and ran as Petitioner grabbed the steering wheel from the back seat. (T 107-110).

Petitioner submits this evidence is completely consistent with unpremeditated murder, and is not proof beyond a reasonable doubt of the crime of which he stands convicted. While the jury was not required to accept the claim of accident, that only takes the case to second degree murder. There is no showing with evidence that any intent to shoot was not formed and acted upon immediately.

In finding evidence of premeditation and deliberation, the Michigan Court of Appeals cited that Petitioner and

Williams had had trouble in the past, including an incident involving stereo speakers. (Apx. A7). But that is scarcely proof that an intent to kill was formed back at the time of the speaker incident.

The state Court of Appeals ruling involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The federal court should overturn a state court finding that is found to be unreasonable, as the Court did in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999).

The lower court also cited the Petitioner's own statement to police. With all due respect to the Court, Petitioner submits that where his statement does not admit that the intent to kill was formed in advance, it is unreasonable to find that the statement nevertheless is evidence that the intent to kill was formed in advance.

This Court should therefore grant Certiorari and ultimately reduce the conviction to second degree murder and remand to the Genesee County Circuit Court for resentencing.

QUESTION 7: WHETHER PETITIONER WAS DENIED DUE PROCESS BY THE FAILURE OF THE JUDGE TO INSTRUCT ON THE LESSER OFFENSE OF INVOLUNTARY MANSLAUGHTER.

The due process clause of the Fourteenth Amendment requires that instructions regarding a lesser offense be given when supported by the evidence. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed. 2d 392 (1980); *Keeble v. United States*, 412 U.S. 205; 93 S.Ct. 1993; 36 L.Ed. 2d 844 (1973); *Ferrazza v. Mintzes*, 735 F.2d 967 (6th Cir. 1985); *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir.1988). The test is whether the jury could rationally find guilt on the lesser offense but not the greater. *United States v. Crutchfield*, 547 F.2d 496, 499 (9th Cir. 1977). Yet, here the Sixth Circuit denies that there is any such rule. (Apx. A15).

In this case, Petitioner admitted to police that he was holding the firearm when it went off, striking the deceased. However, he also stated that at the time, the deceased grabbed for the gun, making it go off accidentally. (T 182-185, 191).

A jury could find that the Petitioner acted with gross negligence when he held the gun pointed in the direction of Williams. Therefore, even if the jury did not hold the deceased responsible for the gun going off, they could certainly find that it was gross negligence, rather than intent to kill, that was the intent with which Petitioner acted.

If a person is guilty of gross negligence, and the negligence causes death, the proper conviction is for involuntary manslaughter. M.C.L. 750.321; *People v. Richardson*, 409 Mich. 126 (1980).

Under Michigan law, if the judge had instructed on

involuntary manslaughter, and Petitioner had been convicted of that charge, his conviction could not be reversed for insufficient evidence. *People v. Kamin*, 405 Mich. 482, 498 (1979); *People v. Chamblis*, 395 Mich. 408, 423 (1975). Therefore an instruction on possession was required upon request. *Beck v. Alabama*, supra; *United States v. Crutchfield*, supra; *Keeble v. United States*, supra.

The Michigan Court of Appeals denied this issue on the basis of no objection or motion. This was error. In *People v. Townes*, 391 Mich. 578 (1974), the Michigan Supreme Court held that it was reversible error to instruct on one form of manslaughter but not the other, where the one not instructed on was supported by the evidence. They held this even though there was no objection or request for the instruction by the defense. Michigan cases decided both before and after Petitioner's trial have found this to be reversible error without regard to objection or request, see *People v. Jones*, 419 Mich. 577 (1984); *People v. Martin*, 130 Mich. App. 609 (1983); *People v. Hess*, 214 Mich. App. 33 (1996).

Therefore, the state court ruling of failure to objection or request the instruction does not bar federal court review. The failure to object constitutes a bar only if the state has a strictly and regularly followed rule that failure to object at the time of sentencing acts as a waiver. See *Johnson v. Mississippi*, 486 U.S. 578, 587; 108 S.Ct. 1981; 100 L.Ed.2d 575 (1988).

Neither the state nor the federal court actually purported to examine the elements of involuntary manslaughter and relate them to the evidence. Assertion was their substitute for analysis of the legal claim.

The error is not harmless. See *Schad v. Arizona*, 501 U.S. 624; 111 S. Ct. 2491; 115 L.Ed.2d 555 (1991):

> "As we later explained in *Spaziano v. Florida*, 468 U.S. 447, 455 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or nothing choice"

In this case, a rational jury really could find that the gun went off as a result of Petitioner's gross negligence. Because that was not one of the options, they could not express such a finding it their verdict. This is why *Schad* and *Beck* require that the lesser included offense alternative be given.

There is no doubt that failure to instruct on lesser included offenses which are supported by the evidence is an issue often raised in the courts, making it a good subject for Supreme Court review.

This Court should grant Certiorari and ultimately order a new trial.

QUESTION 8: WHETHER PETITIONER WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL THAT REQUESTED NO INSTRUCTIONS TO THE JURY ON ANY OF THE PETITIONER'S DEFENSES.

Counsel failed to ask for instructions on involuntary manslaughter, accident, and careless reckless or negligent use of a firearm resulting in death. There is no doubt that accident is supported by the evidence. According to Sgt. Korabik, Petitioner said that the gun went off by accident when Williams grabbed it. (T 191). Because accident is supported, and because a reasonable person could find Petitioner was grossly negligent in having the gun out, involuntary manslaughter is supported by the evidence as well. (See Issue VII). And, if the jury could find Petitioner grossly negligent, they could find ordinary negligence, justifying the instruction on careless, reckless or negligent use of a firearm resulting in death.

Accordingly, the Court of Appeals ruling that these were not supported by the evidence involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The federal court should overturn a state court finding that is found to be unreasonable, as the Court did in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999).

The ruling says that it is acceptable for the defense

counsel to pursue one defense over another, and Petitioner does not dispute that. However, what defense did defense counsel pursue? That Petitioner did not intend to shoot the deceased. How could an instruction on involuntary manslaughter possibly interfere with that defense? How can a court just guess that this was "tactical" and not carelessness by the attorney?

In *Landers v. Rees*, 782 F.2d 1042 (6th Cir. 1985), the Court stated "Counsel's failure to pursue a substantial defense, however, violates the defendant's constitutional right when the failure is a result of ineffectiveness or incompetence. See, e.g. *Beasley*, 491 F.2d at 696. In determining whether counsel's assistance was reasonable, we must consider 'all the circumstances.' *Strickland*, 104 S. Ct. at 2065."

In *Lucas v. O'Dea*, 169 F.3d 1028 (6th Cir. 1999), the Court granted Habeas Corpus relief, finding ineffective assistance of counsel for failure to move for jury instructions that concerned a viable defense, or to object to jury instructions that omitted that defense.

Prejudice is apparent. It is reasonably probable that a jury might find involuntary manslaughter or accident where the prosecutor admits into evidence the defendant's out of court statement that it happened that way. However, it is not reasonably probable when the defense counsel does not ask for it, and the judge does not instruct on it.

This Court should grant Certiorari and ultimately find ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); U.S. Const., Amend. VI.

QUESTION 9: WHETHER PETITIONER WAS PREJUDICED BY THE CUMULATIVE EFFECT OF THE ERRORS.

It has long been held that if the combined weight of errors deprives the accused of a fair trial, this requires reversal even if individual errors standing alone would not require reversal. *Herbert v. Louisiana*, 272 U.S. 312, 316; 47 S.Ct. 103; 71 L.Ed.2d 270 (1926); *United States v. Jones*, 482 F.2d 747 (D.C. Cir. 1973); *Cooper v. Sowders*, 837 F.2d 284 (6th Cir. 1988); *People v. Wallace*, 160 Mich. App. 1 (1987); *People v. Rosales*, 160 Mich. App. 304 (1987).

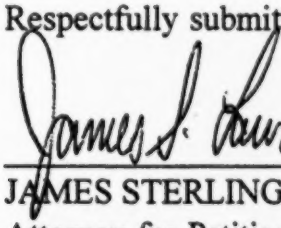
The Sixth Circuit ruling in this case puts an end to that line of cases, by holding that a claim based on cumulative effect of issues is not justiciable and cannot be granted. (Apx. A18-A19).

Because this is an opinion for publication, the legal issue of cumulative effect of errors is now dead, for Petitioner Scott and other litigants. This Court should grant Certiorari to determine the fate of cumulative effect as an issue.

CONCLUSION

Petitioner Cortez Scott respectfully submits that for the reasons stated above, this Court should grant Certiorari, and upon consideration grant a Writ of Habeas Corpus, or order the lower courts to do so.

Respectfully submitted,



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Dated: December 2, 2002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Cortez Scott,
Petitioner-Appellant,
v. **No. 01-1475**
Frank Elo, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 00-71894--Victoria A. Roberts, District Judge.

Argued: August 8, 2002
Decided and Filed: September 6, 2002

Before: KENNEDY, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

OPINION

KENNEDY, Circuit Judge. Petitioner Cortez Scott appeals the denial of his application for writ of habeas corpus. For the following reasons, we affirm the judgment of the district court.

I.

Following a jury trial in Genesee County (Michigan)

Circuit Court, petitioner Cortez Scott was convicted of first degree murder and possession of a firearm during the commission of a felony. The Michigan Court of Appeals summarized the underlying facts:

The record reveals that on the evening of February 16, 1994, defendant shot and killed twenty-one-year-old Tyrone Williams while they and James Crain were driving in Williams' Pontiac Grand Am in Flint. Crain testified that before the shooting he overheard the defendant say that he could rob Williams. Without warning, defendant, who was riding in the back of the car, pulled out a gun and shot Williams in the head. After defendant climbed from the back of the vehicle to the driver's seat, Crain jumped out and defendant sped away. Within an hour, Crain called 911 from a relative's house and told the operator what had happened. Crain indicated that on a previous occasion, defendant shot in Williams' direction after an argument over stereo speakers.

Flint Detective Sergeant Thomas Korabik testified that while conducting an interview at the police station that evening, defendant stated that he and Williams had problems in the past and referred to the incident regarding the stereo speakers. Defendant further stated that while riding in the Grand Am, he began thinking of the previous problems between the two, pulled out the gun, pointed it in the air, and said to Williams, "What's up now?" Defendant then lowered the gun and shot Williams in the head. Defendant explained that after Crain jumped out of the car, he continued to drive

and threw the gun out of the car five houses down the road. Furthermore, defendant indicated that he had the gun in his right pants pocket before Williams picked him up that evening. Williams was found at a nearby school with gunshot wounds to the head and stomach. Blood and brain matter were discovered in the Grand Am. People v. Scott, No. 182235, 1997 WL 33354441, at *2 (Mich.Ct.App. Jan. 21, 1997) (unpublished per curiam opinion) (footnote omitted). Scott was sentenced to life in prison without parole for the murder conviction, and a concurrent two year term for the firearm conviction. On direct appeal to the Michigan Court of Appeals, Scott raised the following claims(1):

I. There was insufficient evidence presented to convict appellant of first degree murder.

II. The prosecutor's argument shifted the burden of proof to appellant which constitutes prosecutor misconduct and reversible error.

III. Appellant was denied due process of law where the record fails to include the entire portion of the prosecutor's final argument.

IV. The jury instructions were reversibly erroneous because the court did not distinguish between voluntary and involuntary manslaughter despite appellant's assertion of an accident defense.

V. Appellant was deprived of his constitutional right of effective assistance of trial counsel.

VI. The cumulative effect of the errors justify reversal

for a new trial.

The Court of Appeals affirmed Scott's convictions. Scott filed a delayed application for leave to appeal with the Michigan Supreme Court. The Michigan Supreme Court vacated the opinion of the Court of Appeals with respect to the transcript issue, finding that the Court of Appeals could not resolve some of Scott's claims where a portion of the transcript of the prosecutor's closing argument was missing, and remanded for further proceedings. The Court directed that the Court of Appeals obtain a videotape or a complete transcript of the trial, or direct settlement of the record pursuant to M.C.R. 7.210(B)(2) before addressing the merits of Scott's claims of prosecutor misconduct and ineffective assistance of counsel. As to all other claims, the Michigan Supreme Court denied leave to appeal. People v. Scott, 575 N.W.2d 549 (Mich. 1998).

The appellate court found that the trial transcript omitted approximately eighteen minutes of the prosecutor's closing argument, and that no other transcript or videotape of the closing argument existed. It therefore directed the trial court to settle the record. On remand, the trial court held a hearing to determine what happened during the missing portion of the prosecutor's closing arguments. After reviewing the record of that hearing and the record on appeal, the Michigan Court of Appeals again affirmed Scott's convictions. The Michigan Supreme Court denied leave to appeal. Scott then filed a petition for writ of habeas corpus

with the U.S. District Court for the Eastern District of Michigan, advancing the same claims he had made in the state courts. On March 8, 2001, the district court denied Scott's petition. This appeal followed.

II.

We review the district court's legal conclusions de novo and its factual findings for clear error. DeLisle v. Rivers, 161 F.3d 370, 380 (6th Cir.1998). Scott filed his petition for federal habeas corpus relief on April 25, 2000. Thus, the 1996 amendments to 28 U.S.C. § 2254, embodied in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), are applicable to Scott's petition. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997).

The Supreme Court recently described the standard for reviewing state court decisions under the AEDPA as follows:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied - the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion

opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Williams v. Taylor, 529 U.S. 362, 412-13 (2000). With these standards in mind, we consider each of Scott's claims in turn.

A. Insufficiency of the Evidence

Scott's first argument is that there was insufficient evidence to convict him of first degree murder. Specifically, he contends that there was no evidence that the killing was premeditated and deliberate. In Jackson v. Virginia, the Court held that a petitioner is not entitled to habeas corpus relief based on insufficient evidence where, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. 307, 319 (1979); Sanders v. Freeman, 221 F.3d 846, 856 (6th Cir. 2000). This standard applies whether the evidence of guilt was direct or circumstantial. See Spalla v. Foltz, 788 F.2d 400, 402 (6th Cir. 1986).

Under Michigan law, first degree murder requires a showing by the prosecution that the defendant intentionally killed the victim, and that the act of killing was premeditated and deliberate. People v. Schollaert, 486 N.W.2d 312, 318

(1992). Here, both the Michigan Court of Appeals and the district court found that the evidence supported the conviction for first degree murder. Both courts relied on evidence that Scott had placed a gun in his pocket before Williams picked him up, the testimony of Crain that Scott and Williams had a prior dispute over stereo speakers, Scott's admission that he had ill feelings toward Williams, and evidence that Scott shot Williams a second time in the stomach after leaving the scene of the first gunshot. Scott argues that there are possible alternative explanations for these occurrences, and that they do not necessarily show premeditation or deliberate killing. Under the Jackson standard, Scott's arguments in this regard are inapposite. A reasonable trier of fact could have drawn from the evidence described above the reasonable inference that Scott's decision to kill Williams was premeditated and that the act of killing was deliberate. Scott's insufficiency of the evidence claim therefore fails.

B. Prosecutorial Misconduct

Scott's second claim is that the prosecutor improperly shifted the burden of proof at trial. He points to the prosecutor's statement during closing arguments that "there's no evidence of heat of the moment, heat of passion, of some sudden unexplainable impulse." Scott argues that this statement improperly placed the burden on Scott to show some evidence of a factor that would reduce the crime from first degree murder, rather than leaving the burden with the

prosecutor to prove the elements of premeditation and deliberate killing beyond a reasonable doubt. The district court concluded that this claim was barred by procedural default and, alternatively, lacked merit.

The opinion of the Michigan Court of Appeals, the last reasoned opinion of the Michigan courts considering this claim, determined that Scott had waived the claim of error by failing to object at trial to the prosecutor's remarks. The court therefore considered only whether the remarks resulted in a miscarriage of justice or whether a cautionary instruction could not have cured any error, concluding:

The record reveals that the prosecutor merely argued that defendant intended to kill in a cold-blooded, premeditated, and deliberate manner. Such an argument amounts to nothing more than discrediting the defense, which is proper. . Moreover, the trial court's instruction regarding the burden of proof cured any possible prejudicial effect from the prosecutor's closing argument. Scott, 1997 WL 33354441, at *3; see also People v. Scott, No. 182235, 1998 WL 1990436, at *1, n.1 (Mich. Ct. App. 1998) (on remand) (reaffirming prior finding that no comments could be construed as shifting the burden of proof, and that defendant had not objected to any comments made by the prosecutor). The district court, therefore, found that this claim was procedurally defaulted.

Scott contends that this was error because neither the Michigan Court of Appeals nor the district court had the

benefit of a complete transcript of the closing arguments to determine whether Scott's counsel did, in fact, object to any statements made by the prosecutor. Yet, the statement at issue was made during the prosecutor's rebuttal, which was fully transcribed. The missing portion of the transcript covered the beginning of the prosecutor's first closing argument. Defense counsel clearly did not object at any time between the statement at issue and the conclusion of the arguments. In any event, the trial court held a hearing to determine what was said during closing arguments. The prosecutor reconstructed an outline of his argument from notes that he had maintained. The prosecutor was then asked whether the defense made any objections to his closing argument, to which he responded that he did not recall any objections during closing arguments. Although defense counsel was not specifically asked at the hearing whether he objected during the prosecution's closing argument, he did not refute the account given by the prosecutor.

It appears that Scott made no objection to the prosecutor's argument. Any contention that there might have been an objection is sheer speculation and is contrary to the testimony at the settlement of the record hearing, as well as the portion of the record that we do have. Scott does not argue that he can show cause and prejudice for his failure to object at trial, nor does he make a showing of actual innocence. Hence, this claim is procedurally defaulted. In any event, as the district court noted, any prosecutorial

misconduct in this statement was not so severe as to deprive Scott of a fair trial. Nor was any error such that the jury instructions could not cure it. The trial judge issued proper instructions on the burden of proof and instructed that anything the attorneys had said to the contrary was to be disregarded. Scott's prosecutorial misconduct claim is meritless.

C. Transcription Error

Scott's third claim is that the failure to transcribe a significant portion of the closing argument denied him due process. Scott again notes that the missing portion of the transcript may conceal an objection he may have made to some improper statement by the prosecutor. Scott notes that his counsel could not remember exactly what was said during the closing arguments, and he was therefore left to the mercy of the prosecutor's notes and memory, which yielded nothing that would aid Scott in his appeal. Scott relies heavily on the Supreme Court's opinion in Mayer v. Chicago, 404 U.S. 189 (1971), to argue that due process requires that a defendant be given a reliable record of sufficient completeness to permit proper review of his claims. Yet, Mayer was a case in which there was an existing record, and the only question was whether an indigent defendant convicted of a nonfelony, rather than a felony, was entitled to the complete transcript where the defendant's grounds for appeal made out a colorable need for a complete transcript. The Court held that such a defendant must be afforded a "'record of sufficient

completeness' to permit proper consideration of [his] claims." Id. at 194. The Court went on to acknowledge that a record of sufficient completeness did not necessarily require a verbatim transcript, so long as the state found other means of providing an adequate record, such as an agreed statement of facts, a full narrative statement based on a court reporter's notes or a judge's notes, or a bystander's bill of exceptions. Id. The Court placed the burden on the state, in that situation, to show that something less than a complete transcript would be sufficient.

Mayer does not stand for the proposition, implicit in Scott's argument, that where a portion of a trial transcript is missing and unobtainable, and where a defendant makes a claim that could possibly implicate that portion of the transcript, a retrial is always necessary. Rather, the Sixth Circuit has held that federal habeas relief based on a missing transcript will only be granted where the petitioner can show prejudice. Bransford v. Brown, 806 F.2d 83, 86 (6th Cir. 1986). In Bransford, the court considered whether the unavailability of transcripts of jury instructions was a per se violation of due process. The trial court in that case determined that the transcript of the instructions was irretrievably lost and was incapable of reconstruction. Bransford argued that he should be entitled to review the instructions for error. Although Bransford proffered no specific errors, his trial attorney recalled having made some objections to the instructions at trial. The court held that this

situation did not present a per se violation of due process. Instead, a petitioner "must show prejudice resulting from the missing transcripts." Id. The court went on to note: "Although this court recognizes the difficulty in demonstrating prejudice where the transcripts are missing, petitioner must present something more than gross speculation that the transcripts were requisite to a fair appeal." Id. The court found insufficient Bransford's argument that errors are frequently found in jury instructions for felony murder trial, and his trial attorney's recollection that some unspecified objections were made.

Here, Scott offers nothing more than gross speculation of error in the missing portion of the transcript. He contends that the prosecutor might have made some improper comments. He also contends that his attorney might have objected to the one specific statement Scott identifies as improper. Yet, as discussed above, the transcript is complete following that one statement, and no objection was made to it. Further, the prosecutor could not recall any objections during closing arguments, and defense trial counsel did not dispute the prosecutor's account. Nor did defendant or his lawyer make any allegation of misconduct beyond the one in the rebuttal argument. Scott has not shown prejudice resulting from the transcription error. Scott is therefore not entitled to habeas relief based on the transcription error.

D. Jury Instruction

Scott's fourth claim is that the trial court erred by not giving

the jury an instruction on involuntary manslaughter. The trial court instructed the jury on first degree murder, second degree murder, and voluntary manslaughter. Scott did not request an involuntary manslaughter instruction at trial. The Michigan Court of Appeals denied relief on this claim based upon Scott's failure to request the instruction. Hence, this claim is procedurally defaulted unless Scott can show cause and prejudice, or show that denial of relief will result in a fundamental miscarriage of justice.

Scott argues that ineffective assistance of trial counsel provides the cause for his failure to request an involuntary manslaughter instruction. As the district court found, however, even if we assume that Scott can establish cause, he cannot demonstrate actual prejudice or a fundamental miscarriage of justice. There was not sufficient evidence for a jury to reach a verdict of involuntary manslaughter. The only theory that Scott now advances to support such a verdict is that the shooting was an accident. Scott points to his written statement, in question and answer form, to the police.

Q: At one point while you were in the car, you pulled the gun from your pocket?

A: Yes.

Q: And held it in the air?

A: Yes.

Q: What did you say at that time?

A: What was up between me and him.

Q: Between you and Tyrone?

A: Yes.

Q: What did you do then?

A: By that time, Terry had left out the car, jumped out the car. Tyrone had grabbed my hand and I squeezed the trigger and it went off.

Q: Meaning the gun went off?

A: Yes. The natural reflex and I jumped, but the gun had went off by then.

Scott argues that this evidence was sufficient to require an involuntary manslaughter instruction. He ignores, however, evidence that would prevent a reasonable jury from finding involuntary manslaughter. First, this statement differed from his responses during an informal interview, in which Scott said that he pulled out the gun, put it up in the air, said "What's up now?" and then lowered the gun and shot Williams. Further, the first gunshot wound was in the right side of Williams's head, above the right ear and slightly behind the temple. If Williams had turned around to face Scott, it is unlikely that the bullet would have entered at that point. Most importantly, Scott ignores the evidence that he left the scene of the first shooting, drove to a parking lot, pulled Williams out of the car, and shot him one more time. Even if a reasonable jury could have found that the first shot was an accident, no reasonable jury could have found that the second shot was accidental. When considering all the evidence presented at trial, it simply did not support an involuntary manslaughter instruction.

Moreover, even if Scott's claim was not procedurally defaulted, and even if the trial court erred as a matter of state law, that is not a sufficient basis for granting habeas relief. Although the Supreme Court has held that it is a violation of due process for a court to fail to instruct on a lesser included offense supported by the evidence in a capital case, see Beck v. Alabama, 447 U.S. 625, 627 (1980), it has not so held in noncapital cases. To the contrary, the Sixth Circuit has held that failure to instruct on a lesser included offense in a noncapital case is not "such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990). For all of these reasons, Scott is not entitled to habeas relief on this claim.

E. Ineffective Assistance of Counsel

Scott's fifth claim is that he was denied the effective assistance of trial counsel. He advances two reasons: 1) his counsel's failure to request an instruction on involuntary manslaughter, and 2) his counsel's cross-examination of Crain, which brought out testimony that Scott and Williams had been involved in a prior dispute over stereo speakers, and that Scott had shot in Williams's direction during that prior dispute. The test for determining whether counsel is constitutionally ineffective was set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). Under Strickland, a petitioner must first show that counsel's performance was

deficient. To do so, the petitioner must prove that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. Id. Second, the petitioner must establish that counsel's deficient performance prejudiced the defense. Id. This requires a showing that counsel's errors were so serious that they deprived petitioner of a fair trial. Id.

1. Involuntary Manslaughter Instruction

The Michigan Court of Appeals determined that counsel's failure to request a jury instruction on involuntary manslaughter did not amount to a deficient performance because the evidence did not support a finding of involuntary manslaughter, and because counsel made a strategic decision to advance two other defense theories - intoxication and provocation. Having reviewed the record, we cannot say that the Michigan Court of Appeals unreasonably applied the Strickland test. As detailed above, there was insufficient evidence to support an accident theory. That an accident theory was not necessarily inconsistent with the other two defenses does not mean, as Scott argues in his brief, that counsel was deficient for not requesting the instruction. Counsel made a strategic decision to advance the two more plausible defense theories, rather than to present the jury with a different story of how the shooting took place, which could have been easily contradicted by the physical evidence and Scott's own inconsistent statement.

2. Cross Examination of Crain

Scott also contends that his trial counsel's cross examination of Crain was a deficiency amounting to ineffective assistance of counsel. The questioning at issue went as follows:

Q: In your presence, has he ever threatened Tyrone Williams?

A: Yes.

Q: When?

A: About - about four months before that happened, he - you know, him and Tyrone exchanged words, as we was talking - me and somebody else was talking - Cortez shot his gun at Tyrone that day; shot at him, toward him, you know, shot toward him.

Q: What was the argument over?

A: I guess it was a kicker box they had previously argued over; a speaker box.

. . .

Q: Okay, you said that you saw Cortez take a shot at Tryone about four months prior?

A: Yes.

Q: You witnessed that?

A: Yes.

The Michigan Court of Appeals noted that this line of questioning was "unwise," but nonetheless found that it did not meet the Strickland test for ineffective assistance of counsel. The court held that it was not prejudicial to Scott. The police officer who took Scott's statement had already

testified that Scott told him about the stereo speaker dispute, although nothing was mentioned about Scott's shooting in the direction of Williams. The court also held that there was ample evidence, other than this testimony, to support a conviction of first degree murder.

Again, we cannot say that the Court of Appeals' application of Strickland was unreasonable. Although the testimony was not cumulative with respect to Scott's earlier shooting in the direction of Williams, there was sufficient evidence in the record, aside from this fact, to support a first degree murder conviction. As set forth supra, Part II.A., that evidence consisted of Scott's admission that he harbored ill feelings toward Williams, the officer's testimony regarding the earlier speaker dispute, the fact that Scott put a gun in his pocket before he was picked up by Williams, and the fact that he took Williams to a parking lot and shot him a second time. In light of this evidence, Scott is unable to show that counsel's error in following this line of questioning deprived him of a fair trial. Accordingly, Scott's claim of ineffective assistance of counsel fails.

F. Cumulative Error

Scott's final claim is that the cumulative effect of the errors detailed in his first five claims deprived him of a fair trial. The Michigan Court of Appeals rejected this claim because it found no errors in Scott's other claims. The Supreme Court has not held that constitutional claims that would not individually support habeas relief may be

cumulated in order to support relief. See Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002). In any event, we do not find that any errors, even when cumulated, denied Scott a fair trial. The Michigan court's decision was not contrary to, nor an unreasonable application of, federal law.

III.

For the foregoing reasons, we affirm the judgment of the district court.

Footnotes

1 Claims I through III were raised by Scott through his counsel. Claims IV through VI were raised by Scott in pro per.

2 M.C.R. 7.210(B)(2) provides:

(2) Transcript Unavailable. When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall file a settled statement of facts to serve as a substitute for the transcript.

(a) Within 14 days after filing the claim of appeal, the appellant shall file with the trial court or tribunal clerk, and serve on each appellee, a proposed statement of facts. The proposed statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to inform the Court of Appeals of the nature of the controversy and of the proceedings in the trial court or tribunal.

(b) The appellant shall notice the proposed statement of facts for prompt settlement before the trial court or tribunal. An amendment or objection to the proposed statement of facts must be in writing, filed in the trial court or tribunal before the time set for settlement, and served on the appellant and any other appellee.

(c) The trial court or tribunal shall settle any controversy and certify a statement of facts as an accurate, fair, and complete statement of the proceedings before it.

(d) The statement of facts and the certifying order must be filed with the trial court or tribunal clerk and a copy of the certifying order must be filed with the Court of Appeals.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORTEZ SCOTT,
Petitioner.

-vs-

CASE NO. 00-CV-71894-DT
HON. VICTORIA A ROBERTS

FRANK ELO,
Respondent.

OPINION AND ORDER DENYING PETITION FOR HABEAS CORPUS

Petitioner Cortez Scott ("Petitioner"), a state prisoner currently confined at the Harrison Correctional Facility in Adrian, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of first-degree murder and felony firearm following a jury trial in the Genesee County Circuit Court in 1994. He was sentenced to life imprisonment without parole on the murder conviction and a consecutive term of two years imprisonment on the firearm conviction.

Petitioner challenges the constitutionality of his state court proceedings, raising claims concerning the sufficiency of the evidence, prosecutorial misconduct, the failure to

transcribe part of the prosecutor's closing argument, the failure to instruct the jury on involuntary manslaughter, the effectiveness of trial counsel, and cumulative error. For the reasons stated below, Petitioner's request for habeas relief is denied and the petition for a writ of habeas corpus is dismissed.

I. Factual Background

Petitioner's convictions stem from the shooting death of Tyrone Williams on February 16, 1994 in Flint, Michigan. The Michigan Court of Appeals described the salient facts as follows:

> The record reveals that on the evening of February 16, 1994, defendant shot and killed twenty-one-year-old Tyrone Williams while they and James Crain were driving in Williams' Pontiac Grand Am in Flint.' Crain testified that before the shooting he overheard the defendant say that he could rob Williams. Without warning, defendant, who was riding in the back of the car, pulled out a gun and shot Williams in the head. After defendant climbed from the back of the vehicle to the driver's seat, Crain jumped out and defendant sped away. Within an hour, Crain called 911 form a relative's house and told the operator what had happened. Crain indicated that on a previous occasion, defendant shot in Williams' direction after an argument over stereo speakers.

Flint Detective Sergeant Thomas Korabik testified that while conducting an interview at the police station that evening, defendant stated that he and Williams had problems in the past and referred to the incident regarding the stereo speakers. Defendant further stated that while riding in the Grand Am, he began thinking of the previous problems between the two, pulled out the gun, pointed it in the air, and said to Williams, "What's up now?" Defendant then lowered the gun and shot Williams in the head. Defendant explained that after Crain jumped out of the car, he continued to drive and threw the gun out of the car five houses down the road.' Furthermore, defendant indicated that he had the gun in his right pants pocket before Williams picked him up that evening. Williams was found at a nearby school with gunshot wounds to the head and stomach. Blood and brain matter were discovered in the Grand Am.

'Crain testified that they purchased beer at a drive-up party store, drove around drinking the beer and smoking a marijuana cigar, and made brief stops at two girlfriends' homes before the shooting occurred.

[2]In making his police statement, Petitioner also told Detective Korabik that he pulled the trigger of the gun when Williams grabbed his hand.

People v. Scott, No. 182235, *2 (Mich. Ct. App. Jan. 21, 1997) (unpublished) (footnotes supplied).

At the close of trial, the jury found Petitioner guilty of first-degree murder and felony firearm. The trial court subsequently sentenced him to the mandatory terms of life imprisonment without parole plus two years imprisonment.

II. Procedural History

Following his convictions and sentencing, Petitioner filed an appeal as of right with the Michigan Court of Appeals, raising the following claims through counsel and in pro per:

I. There was insufficient evidence to convict him of first-degree murder.

II. The prosecutor's argument shifted the burden of proof which constitutes prosecutor misconduct and reversible error.

III. He was denied due process of law where the record fails to include the entire portion of the prosecutor's final argument.

IV. The jury instructions were reversibly erroneous because the court did not distinguish between voluntary and involuntary manslaughter despite his assertion of an accident defense.

V. He was deprived of his constitutional right of effective assistance of trial counsel.

VI. The cumulative effect of the errors justify reversal for a

new trial.

The Court of Appeals affirmed Petitioner's convictions and sentence. People v. Scott, No. 182235 (Mich. Ct. App. Jan. 21, 1997) (unpublished). Petitioner then filed a delayed application for leave to appeal with the Michigan Supreme Court raising the same issues. In lieu of granting leave to appeal, the Michigan Supreme Court vacated the portion of the Court of Appeals' opinion which addressed the transcript issue and remanded for further proceedings. In all other respects, leave to appeal was denied. People v. Scott, 456 Mich. 931, 575 N.W.2d 549 (Feb. 3, 1998).

On remand, the trial court conducted a hearing concerning the prosecutor's closing argument. Reviewing that evidence as well as the record on appeal, the Michigan Court of Appeals found that there was no indication of prosecutorial misconduct during closing arguments and again affirmed

Petitioner's convictions and sentence. People v. Scott (on remand), No. 182235 (Mich. Ct. App. Aug. 18, 1998) (unpublished). Petitioner then filed another delayed application for leave to appeal with the Michigan Supreme Court, which was denied. People v. Scott, 459 Mich. 982, 593 N.W.2d 554 (April 27, 1999).

Petitioner, through counsel, filed the present habeas petition on April 25, 2000, raising the same claims presented to the Michigan appellate courts. Respondent filed an answer to the petition on September 11, 2000, asserting that

Petitioner's claims should be denied based upon procedural default and/or for lack of merit.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), govern this case because Petitioner filed this habeas petition after the AEDPA's effective date. See Lindh v. Murphy, 521 U.S. 320, 336 (1997). The AEDPA provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §2254(d) (1996).

In Williams v. Taylor, - U.S. , 120 S. Ct. 1495 (2000), the United States Supreme Court undertook a detailed

analysis of the correct standard of review under the AEDPA. According to the Supreme Court:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied - the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined the by Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 1523 (O'Connor, J., delivering the opinion of the Court on this issue).

In evaluating a state court decision under the "unreasonable application" clause, the Supreme Court further

stated that a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 1522. "Under § 2254(d)(1)'s `unreasonable application' clause, then, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id.

The Supreme Court also clarified that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," refers only to "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Id. at 1523. In determining what constitutes clearly established federal law, therefore, a federal habeas court must look to pertinent United States Supreme Court precedent.

Lastly, this Court must presume that state court factual determinations are correct. 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. See Warren v. Smith, 161 F.3d 358, 360-61 (6th Cir. 1998).

IV. Analysis

A. Insufficient Evidence Claim

Petitioner first claims that he is entitled to habeas relief because there was insufficient evidence presented at trial to

convict him of first-degree murder. Specifically, Petitioner claims that the prosecution failed to establish that he acted with intent to kill and premeditation and deliberation.

In Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court established that a federal court's review of a sufficiency of the evidence claim must focus on whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319; see also DeLisle v. Rivers, 161 F.3d 370, 389 (6th Cir. 1998). Because a claim of insufficiency of the evidence presents a mixed question of law and fact, Huynh v. King, 95 F.3d 1052, 1059 (11th Cir. 1996); Maes v. Thomas, 46 F.3d 979, 988 (10th Cir. 1995), this Court must determine whether the state court's application of the Jackson standard was reasonable.

Under Michigan law, first-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. People v. Schollaert, 194 Mich. App. 158, 170, 486 N.W.2d 312 (1992). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. Id. Premeditation and deliberation may be established by evidence of "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." Id. Circumstantial evidence and

reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. People v. Jolly, 442 Mich. 458, 466, 502 N.W.2d 177 (1993).

In concluding that sufficient evidence was presented to support Petitioner's conviction, the Michigan Court of Appeals stated:

> We find that there was sufficient evidence presented of premeditation and deliberation. Defendant told an investigating officer that he placed the gun in his pocket before the victim picked him up that evening, and he confessed to pulling the trigger and shooting Williams. Defendant also admitted to pointing the gun in the air before shooting Williams. Furthermore, Crain testified that defendant and Williams had previously disputed over stereo speakers, and defendant admitted that he harbored ill feelings against Williams. Defendant also shot Williams a second time in the stomach after driving the car from the scene of the first gunshot. A reasonable inference may be drawn from this evidence that defendant planned to shoot Williams before defendant entered the car and that he had an opportunity to "take a second look" before shooting. A reasonable inference also may be drawn from this evidence that defendant deliberately intended to kill Williams. When viewed in a light most favorable to the prosecution, we find ample evidence

that the elements of premeditation and deliberation were proven beyond a reasonable doubt.

People v. Scott, No. 182235, *2 (Mich. Ct. App. Jan. 21, 1997).

Having carefully reviewed the record, this Court cannot conclude that the Michigan Court of Appeals' determination that the facts demonstrated Petitioner's intent to kill and premeditation and deliberation is unreasonable. The testimony presented at trial revealed that Petitioner armed himself prior to meeting with Williams and Crain, that he spoke of robbing Williams, that he and Williams had past disagreements, that he pointed his weapon at Williams, pulled the trigger, and shot Williams in the head, and that he shot Williams a second time in the stomach after leaving the scene of the first shooting. See Trial Tr., vol. II, pp. 71, 104-08, 136, 181-85. Given this evidence, a rational trier of fact could find that the prosecution established beyond a reasonable doubt that Petitioner acted with intent to kill, as well as premeditation and deliberation.

Petitioner's insufficient evidence claim essentially challenges the inferences that the jury drew from the testimony presented at trial and challenges the weight to be accorded certain pieces of evidence. However, it is well-settled that "[a] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume - even if it does not affirmatively appear in the

record - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Walker v. Engle, 703 F.2d 959, 969-70 (6th Cir. 1983). Given the evidence presented at trial, including Petitioner's own statement, this Court finds that a rational trier of fact could have found that Petitioner acted with the intent to kill and premeditation and deliberation so as to support his first-degree murder conviction beyond a reasonable doubt. Petitioner is therefore not entitled to relief on this claim.

B. Prosecutorial Misconduct Claim

Petitioner also contends that he is entitled to habeas relief because the prosecutor engaged in misconduct by shifting the burden of proof to the defense. Specifically, Petitioner objects to the prosecutor's argument that "there's no evidence of heat of the moment, heat of passion, of some sudden unexplainable impulse." See Trial Tr., vol. II, p. 212. Respondent asserts that this claim is barred by procedural default and otherwise lacks merit. This Court agrees.

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. See Wainwright v. Sykes, 433 U.S. 72, 85-87 (1977); Couch v. Jabe, 951 F.2d 94, 96 (6th Cir. 1991). In Wainwright, the United States Supreme Court explained that a petitioner's procedural default in the state courts will preclude federal habeas review if the last

state court rendering a judgment in the case rested its judgment on the procedural default. 433 U.S. at 85. In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263-64 (1989). The last explained state court judgment should be used to make this determination. Ylst v. Nunnemaker, 501 U.S. 797, 803-05 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. Id.

Here, the Michigan Court of Appeals rendered the last reasoned opinion. In dismissing Petitioner's claim, the Court of Appeals relied upon a state procedural bar, explaining:

> Because defendant did not object at trial to any of the prosecutor's remarks, we will consider this issue only to redress a miscarriage of justice or if a cautionary instruction could not have cured the error .... The record reveals that the prosecutor merely argued that defendant intended to kill in a cold-blooded, premeditated, and deliberate manner. Such an

> argument amounts to nothing more than discrediting the defense, which is proper .... Moreover, the trial court's instruction regarding the burden of proof cured any possible prejudicial effect from the prosecutor's closing argument.

People v. Scott, No. 182235, *3 (Mich. Ct. App. Jan. 21, 1997); see also People v. Scott (on remand), No. 182235, *3, n. 1 (Mich. Ct. App. Aug. 18, 1998).

The failure to make a contemporaneous objection is a recognized and firmly-established independent and adequate state law ground for refusing to review trial errors. *Coleman v. Thompson,* 501 U.S. 722, 750-51 (1991). Moreover, a state court does not waive a procedural default by looking beyond the default to determine if there are circumstances warranting review on the merits. Paprocki v. Foltz, 869 F.2d 281, 285 (6th Cir. 1989). Nor does a state court fail to sufficiently rely upon a procedural default by ruling on the merits in the alternative. See McBee v. Abramajtys, 929 F.2d 264, 267 (6th Cir. 1991). The Court of Appeals dismissed Petitioner's prosecutorial misconduct claim based upon procedural default -his failure to object at trial.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. Coleman,

501 U.S. at 753; Gravley v. Mills, 87 F.3d 779, 784-85 (6th Cir. 1996).

Petitioner neither alleges nor establishes cause to excuse his procedural default. Rather, he claims that because part of the prosecutor's closing argument was not transcribed, it is unknown whether an objection was made. At the evidentiary hearing before the trial court, however, the prosecutor testified that the defense did not object to his closing argument. Defense counsel did not refute this testimony. See 3/30/98 Hrg. Tr., p. 12. Petitioner also appears to have acknowledged on direct appeal that no objection was made. See Appellant's Brief on Appeal, p. 12.

Additionally, Petitioner cannot demonstrate actual prejudice, or that a fundamental miscarriage of justice has occurred. The United States Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935). To prevail on a prosecutorial misconduct claim, a habeas petitioner must demonstrate that the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Factors to be considered in weighing the extent of a prosecutor's misconduct are:

> the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the

> accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997) (quoting Serra v. Michigan Dept. Of Corrections, 4 F.3d 1348, 1355-56 (6th Cir. 1993)). "[T]o constitute the denial of a fair trial, prosecutorial misconduct must be `so pronounced and persistent that it permeates the entire atmosphere of the trial,' or `so gross as probably to prejudice the defendant.'" Id. (citations omitted). Even assuming that the prosecution erred in this case, such conduct was not so pronounced or persistent as to deprive Petitioner of a fair trial. Moreover, the trial court instructed the jurors on the burden of proof, see Trial Tr. vol. Il, pp. 215, 221-24; vol. 111, pp. 4-6, and informed them that if one of the lawyers said something differently, they were to follow the judge's instructions. See Trial Tr., vol. 11, p. 214. Petitioner has thus failed to establish that the alleged prosecutorial misconduct deprived him of a fair trial and is not entitled to relief on this claim.

C. Transcription Error Claim

Petitioner next claims that he is entitled to habeas relief because a portion of the prosecutor's closing argument was not transcribed due to error. Due process requires that a

defendant in a criminal case be provided with a transcript of a prior proceeding when that transcript is needed for an effective defense or appeal. See, e.g., Britt v. North Carolina, 404 U.S. 226, 227 (1971). However, a state prisoner seeking federal habeas must demonstrate prejudice due to a missing transcript before a constitutional violation of a right to a fair appeal will be found. Bransford v. Brown, 806 F.2d 83, 86 (6th Cir. 1986); accord White v. Florida, 939 F.2d 912, 914 (11th Cir. 1991); Mitchell v. Wyrick, 698 F.2d 940, 941-42 (8th Cir. 1983).

On remand in this case, the trial court conducted an evidentiary hearing on the missing portions of the prosecution's closing argument. The Michigan Court of Appeals described those proceedings as follows:

> A hearing was held on April 27, 1998 in the lower court and testimony was taken from the original trial prosecutor and defendant's original trial counsel. On May 4, 1998, the trial court order was filed indicating that the prosecutor `stated on the record the closing argument that he presented to the jury during the trial.'
>
> ***
>
> The prosecutor testified at the evidentiary hearing that he prepared a summary of his closing argument, and he relied on those notes in reconstructing the record. The prosecutor also reviewed the trial transcripts. Defense counsel objected to the use of the

> prosecutor's notes in reconstructing the record because the notes did not have a case caption, were not dated, and were not signed. The trial court, however, overruled the objection because the prosecutor testified that the notes were in his handwriting and were created the day before or the day of the actual closing argument. Further, the notes had always been maintained the prosecutor's office in the file he had entitled "People v Cortez Scott."

People v. Scott (on remand), No. 182235, *2 (Mich. Ct. App. Aug. 18, 1998).

Although the Court of Appeals found that the trial transcript omits approximately 18 minutes of the prosecutor's closing argument, it concluded that Petitioner was not denied a fair trial or appeal, stating:

> We have carefully reviewed the prosecutor's reconstruction of his closing argument and find that there is no indication that any prosecutorial misconduct occurred during closing argument at trial. The United States Supreme Court has held that there is a presumption of regularity, indicating that the trial court constitutionally, rather than unconstitutionally, discharged its state and federal duties. Bute v Illinois, 333 US 640; 68 S Ct 763, 92 L Ed 987 (1947). Doubts are to be resolved in favor of the integrity,

> competence, and proper performance by the trial court and state's attorney of their official duties. Id....
>
> In this case, the reconstruction of the prosecutor's closing argument coupled with the presumption of regularity, shows that the prosecutor's closing argument at trial was proper and that defendant was not denied a fair trial.

Id. at *2-3.

This Court finds that the Michigan Court of Appeals' decision in this regard is consistent with United States Supreme Court precedent and constitutes a reasonable application of federal law. Petitioner neither alleges nor establishes prejudice arising from the trial court's inadvertent failure to fully transcribe the prosecutor's closing argument. Petitioner has not shown, nor is there any indication in the record, that a transcript of the prosecutor's entire closing argument was necessary for Petitioner to appeal his convictions. The closing argument was not relevant to most of Petitioner's claims. Further, having reviewed the evidentiary hearing transcripts, this Court agrees with the Michigan Court of Appeals that there is no evidence that prosecutorial misconduct occurred during closing arguments at trial. Accordingly, the failure to fully transcribe that argument cannot be said to have prejudiced Petitioner. See Norris v. Schotten, 146 F.3d 314, 33233 (6th Cir. 1998).

Mere speculation that the transcribed testimony was necessary for a fair appeal precludes a finding of a constitutional violation by this Court. See Bransford, 806 F.2d at 86. Petitioner is not entitled to habeas relief on this due process claim.

D. Jury Instruction Claim

Petitioner also claims that he is entitled to habeas relief because the trial court failed to instruct the jury on involuntary manslaughter. Respondent asserts that this claim is barred by procedural default. As noted, the failure to make a contemporaneous objection is a recognized and firmly-established independent and adequate state law ground for refusing to review trial errors. Coleman, 501 U.S. at 750-51. The Michigan Court of Appeals dismissed Petitioner's jury instruction claim based upon procedural default -- his failure to request the instruction at trial.

Even assuming that Petitioner can establish cause to excuse his default, he cannot demonstrate actual prejudice, or that a fundamental miscarriage of justice has occurred. Under Michigan law, a defendant may request and receive instructions on necessarily included lesser offenses without regard to the evidence, and on cognate lesser included offenses if the evidence would support a conviction on the lesser included offense. See People v. Beach, 429 Mich. 450, 462, 418 N. W.2d 861, 866 (1988). Both voluntary and involuntary manslaughter are cognate lesser included offenses

of murder. See People v. Pouncey, 437 Mich. 382, 388, 471 N.W.2d 346 (1991). The trial court is required to give an instruction for a cognate lesser included offense if: (1) the principal offense and the lesser offense are of the same class or category, and (2) the evidence adduced at trial would support a conviction of the lesser offense. See People v. Hendricks, 446 Mich. 435, 444, 521 N.W.2d 546 (1994). There must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. Pouncey, 437 Mich. at 387. Thus, as a matter of state law, the trial court was not required to give an involuntary manslaughter instruction absent a defense request and sufficient evidence to support such a conviction.

Moreover, even assuming that the trial court erred as a matter of state law, Petitioner is not entitled to relief from this Court. A question concerning a perceived error of state law rarely serves as a basis for federal habeas corpus relief; and does so only when the petitioner is denied fundamental unfairness. See, e.g., Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state court determinations on state law questions"). In Bagby v. Sowders, 894 F.2d 792, 797 (6th Cir. 1990), the United States Court of Appeals for the Sixth Circuit ruled that a state court's failure to instruct the jury on a lesser included offense in a noncapital criminal case is not such a "fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary

demands of fair procedure." Lastly, as noted by the Michigan Court of Appeals with respect to Petitioner's ineffective assistance ofcounsel claim, the physical and testimonial evidence did not reasonably support an involuntary manslaughter instruction. Given the evidence presented at trial, including James Crain's and Detective Korabik's testimony, there was sufficient evidence for the jury to find Petitioner guilty of first-degree murder. Petitioner's jury instruction claim is thus barred by procedural default, lacks merit, and does not warrant relief.

E. Ineffective Assistance of Counsel Claim

Petitioner next claims that trial counsel was ineffective for failing to seek instructions on involuntary manslaughter, accident, and careless, reckless, or negligent use of a firearm resulting in death, and for eliciting prejudicial testimony from James Crain regarding prior disputes between Petitioner and Williams.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced the

defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. Id.

With respect to the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. Id. at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. Id. at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690.

To satisfy the prejudice prong under Strickland, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. In Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993), the United States Supreme Court observed that "an analysis focusing solely on outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable is defective." The United States Court of Appeals for the Sixth Circuit has thus concluded that a reviewing court should focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996). "On balance, the benchmark for judging any claim of ineffectiveness must

be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." Id. at 1311-12 (quoting Strickland, 466 U.S. at 686).

1. Failure to Request Jury Instructions

The Michigan Court of Appeals concluded that counsel was not deficient for failing to request the lesser offense instructions because the evidence did not support such instructions. The court stated:

> It was essentially defendant's theory that he did not have the specific intent to commit first-degree murder because he was intoxicated or high at the time of the shooting and that Williams was shot as the result of a struggle over the gun. Defendant gave two versions of what happened in the car to the police. His second version was that he pulled the gun out from his pocket, held the gun in the air, and asked Williams "what was up" between them. Defendant then claimed that Williams grabbed his hand, defendant squeezed the trigger, and the gun went off. This was directly contrary to defendant's first police statement where defendant stated that he pulled the gun out of his pocket, held it up in the air, said to Williams, "What's up now?" and lowered the gun and shot Williams.

Defendant's contention that the shooting was accidental is totally contrary to the evidence presented. Williams was shot in the right side of his head, about two inches above the right ear and directly behind the temple. After Williams was shot in the head, defendant dumped his body outside of the car and shot him again in the right abdominal area. We note that Williams was sitting in the front driver's seat and defendant was in the back seat of the car. Yet, Williams was shot in the right side of the head, while a claim that Williams grabbed defendant's hand would certainly tend to indicate that Williams would have turned around and faced defendant. The physical evidence of the gunshot would simply does not support this. Moreover, although defendant did. make one claim that Williams grabbed his hand, his statement was that he (defendant) squeezed the trigger and there was no claim in the statement that Williams caused defendant to squeeze the trigger.

Defense counsel in this case was faced with a choice between defenses (intoxication, the shooting was provoked, and accident) with very significant evidentiary problems. One of defendant's own police statements, as well as the physical evidence, and the testimony of James Crain, all supported a first-degree murder conviction. Defense counsel sought out the

> two defenses, intoxication and provocation, that had the greatest likelihood of success in considering the evidence presented. Nothing in the materials before us suggests that counsel was `deficient' in making this choice or that the selection significantly affected the outcome of the trial. "' . . .
>
> Therefore, we conclude that defense counsel was not ineffective for failing to request instructions on involuntary manslaughter, accident, or careless, reckless or negligent use of a firearm with death resulting. The evidence at trial did not support such instructions.

People v. Scott, No. 182235, *3-4 (Mich. Ct. App. Jan. 21, 1997) (citation omitted).

Having reviewed the record, this Court concludes that the Michigan Court of Appeals' decision in this regard is neither contrary to Strickland nor an unreasonable application of federal law. Trial counsel's decision to rely upon the argument that Petitioner was guilty of second-degree murder or voluntary manslaughter due to his intoxication and/or provocation was a matter of trial strategy which will not be second-guessed upon habeas review. See, e.g., Shaba v. United States, 721 F. Supp. 132, 139 (1989), aff'd 896 F.2d 554 (6th Cir. 1990) (decision to pursue mistaken identity defense, rather than attack government's failure to exercise control over informant, was matter of trial strategy and did

not support ineffective assistance claim); Johnson v. Morris, 848 F.2d 191, 1988 WL 50639, * 1 (6th Cir. 1988) (counsel not ineffective for failing to argue that petitioner was guilty of aggravated assault given primary defense that gun accidentally discharged during struggle because such an argument would have compromised strategy for absolution of all guilt). Petitioner's disagreement with counsel's trial strategy does not support an ineffective assistance of counsel claim. See Strickland, 466 U.S. at 689. Petitioner has not shown that counsel was ineffective for failing to make arguments or seek jury instructions which did not comport with the physical evidence, and much of the testimonial evidence, presented at trial. Petitioner is not entitled to habeas relief on this claim.

2. Cross-Examination of James Crain

In response to defense questioning, James Crain, testified that Petitioner and Williams had a disagreement over stereo speakers four months prior to the fatal shooting and that Petitioner shot in Williams' direction during that dispute. See Trial Tr., vol. II, p. 136. The Michigan Court of Appeals concluded that counsel's cross-examination of Crain did not prejudice Petitioner, stating:

> Although counsel's questioning of Crain in this regard was not wise, in the context of Crain's testimony, it was not prejudicial to defendant. On direct

> examination, Crain had testified that defendant told him shortly before the shooting that he could rob Williams for his goods. Moreover, the prosecutor had already elicited testimony from the police officer who took defendant's statement that defendant had told police about the incident regarding the stereo speakers. Thus, Crain's testimony was merely cumulative. Defendant has failed to show that there is a reasonable probability that, but for counsel's cross-examination in this regard, the result of the proceeding would have been different .... There was ample evidence shown by the prosecutor that defendant was guilty of first-degree murder.

Id. at 5-6 (citation omitted).

Having reviewed the record, this Court concludes that the Michigan Court of Appeals' decision is neither contrary to Strickland nor an unreasonable application of federal law. As noted by the Michigan Court of Appeals, Detective Korabik testified about previous disputes between Petitioner and Williams, such that Crain's testimony was somewhat cumulative. More importantly, however, Petitioner cannot establish that he was prejudiced by counsel's conduct given the evidence establishing his guilt of first-degree murder. Petitioner is not entitled to habeas relief on his ineffective assistance of counsel claims.

F. Cumulative Error Claim

Given this Court's determination that Petitioner's constitutional rights were not violated during trial and that none of Petitioner's individual claims warrant habeas relief, the Court finds that Petitioner's claim that the cumulative effect of the alleged errors violated his due process rights is without merit. Petitioner is not entitled to habeas relief on this claim.

V. Conclusion

For the reasons stated, this Court concludes that Petitioner is not entitled to federal habeas relief on the claims presented. Accordingly,

IT IS ORDERED that Petitioner's request for habeas relief is DENIED and the petition for writ of habeas corpus is DISMISSED WITH PREJUDICE.

VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

DATED: 8 – MAR 2001